UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MPM SILICONES, LLC, Plaintiff v. UNION CARBIDE CORPORATION, Defendant	Civ. Action No. 1:11-CV-1542 (LEK/ATB) COMPLAINT (Jury Trial Demanded)

COMPLAINT

MPM Silicones, LLC ("MPM") alleges for its Complaint as follows:

NATURE OF THE ACTION

1. This is a civil action pursuant to the provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. § 9601 *et seq.* ("CERCLA"), for recovery of response costs incurred by MPM and for declaratory judgment for future response costs to be incurred by MPM in response to the release or threat of release of hazardous substances at a facility currently owned and operated by MPM in Sistersville, Tyler County, West Virginia (the "Sistersville Site").

2. MPM also seeks damages and injunctive relief under common law claims based on negligence, strict liability, restitution, indemnity, and private nuisance.

PARTIES

3. Plaintiff MPM is a New York limited liability corporation with its principal place of business located at 260 Hudson River Road, Waterford, NY 12188.

4. Defendant Union Carbide Corporation ("UCC") is a New York Corporation with its principal place of business located at 1254 Enclave Parkway, Houston, Texas 77077.

JURISDICTION AND VENUE

5. This Court has subject matter and ancillary jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1367 and CERCLA §§ 113(b) and 113(g)(2), 42 U.S.C. §§ 9613(b) and 9613(g)(2).

6. Venue is proper in this district pursuant to CERCLA § 113(b), 42 U.S.C. § 9613(b), and 28 U.S.C. § 1391(b) because UCC, a New York corporation, resides or may be found in this district.

FACTS COMMON TO ALL COUNTS

7. The Sistersville Site occupies approximately 1,300 acres, located 6 miles south of Sistersville, West Virginia along the Ohio River. Roughly 50 acres of the Sistersville Site have been developed.

8. In or about 1953, UCC developed the Sistersville Site for use as a chemical manufacturing facility. Prior to UCC's development of the Sistersville Site, the site had been used as farmland.

9. UCC owned and operated the Sistersville Site as a chemical manufacturing facility, producing primarily silanes and silicones, until it was sold to an investment banking firm in or about 1993.

10. UCC used or produced numerous hazardous substances at the Sistersville Site, including without limitation:

a. Chlorosilanes;

b. Dimethylsiloxanes;

c. Polyethers;

d. Allyl chloride;

e. Methanol;

f. Ethanol;

g. Polychlorinated Biphenyls ("PCBs");

h. Trichloroethylene;

i. Perehloroethylene;

j. Trimethylsilanol;

k. 1,1,1 trichloroethane;

l. Chlorobenzene;

m. Acrylonitrile;

n. Chloromethane;

o. Xylene; and

p. Toluene.

11. From approximately the 1950s into the 1970s, UCC used hundreds of thousands of pounds of PCBs in the manufacture of various products, including so-called A1100 and Cyanoethyltriethoxysilane. UCC disposed of the PCBs that were used in the manufacture of its products at several locations within the Sistersville Site, including without limitation in unlined lagoons. During this time period, UCC disposed of other wastes generated at the Sistersville Site, including hazardous substances, in the same manner.

12. In the late 1970s and early 1980s, UCC conducted investigations of its historical waste handling practices and its reporting obligations under newly enacted environmental laws such as the 1976 Resource Conservation and Recovery Act ("RCRA") (codified as amended at 42 U.S.C. § 6901 *et seq.)*, the 1976 Toxic Substances Control Act ("TSCA") § 2601, *et seq.*, and CERCLA (passed in 1980). Although UCC concluded that it had used and disposed of hundreds

of thousands of pounds of PCBs at the Sistersville Site, UCC elected not to disclose that disposal to government regulators.

13. Notwithstanding that UCC had conducted PCB testing that documented the presence of PCBs at the Sistersville Site, including in Sugar Camp Run, a brook that ran across the site, UCC did not disclose the presence and historical use of PCBs in its 1981 Notice of Hazardous Waste Site form submitted to the United States Environmental Protection Agency ("EPA") pursuant to Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), even though the reporting form contained a check-box that was to be marked if PCB wastes were present at the site and CERCLA § 103 placed UCC under a duty to report "any known, suspected, or likely releases" of hazardous substances. Nor did UCC disclose the presence of PCBs to EPA or West Virginia regulators during the RCRA and West Virginia Hazardous Waste Management permit application process for the Sistersville Site, which began in approximately 1980 and extended throughout the 1980s, even though UCC had internally determined that PCBs were the contaminant of greatest concern in some disposal areas.

14. After UCC's sale of the Sistersville Site in 1993, ownership of the Sistersville Site was transferred to Witco Corporation, which was merged into Crompton Corporation in 1999 and, through merger, became Chemtura Corporation in 2005. The Sistersville Site was sold to General Electric Company in 2003. MPM's predecessor in interest acquired the Sistersville Site from General Electric Company in 2006.

15. In connection with its effort to develop a new wastewater treatment facility at the Sistersville Site, MPM sampled soils in the vicinity of the former unlined lagoons utilized by UCC. That sampling revealed concentrations of PCBs as high as 1,744 parts per million.

16. To date, MPM has incurred hundreds of thousands of dollars in PCB sampling costs. UCC has declined to reimburse MPM for those costs.

17. MPM has never used PCBs at the Sistersville Site. On information and belief, UCC is the only entity to have used PCBs at the Sistersville Site.

18. Pursuant to its RCRA Part B Permit, UCC was required to take certain corrective actions, which included periodic groundwater monitoring and the development and maintenance of a number of Solid Waste Management Units ("SWMUs").

19. From 1979 until 1993, UCC deposited solid wastes from the Sistersville Site and from other facilities owned by UCC in a landfill at the Sistersville Site called Landfill No.2, which was permitted and constructed by UCC. That landfill is scheduled to be closed in the near future at a multi-million dollar cost. UCC has indicated that it will not contribute its share of those costs.

20. Although all of the hazardous waste in most of the SWMUs at the Sistersville Site was deposited there by UCC alone, MPM has performed, and continues to perform, the monitoring and maintenance at the SWMUs and the groundwater monitoring necessary to prevent the endangerment of public health, safety, and the environment. UCC has declined to reimburse MPM for the costs of maintaining the SWMUs and monitoring groundwater.

COUNT I — RECOVERY OF COSTS UNDER CERCLA § 107(a)

21. MPM repeats, re-alleges and incorporates by reference as if alleged herein the allegations in paragraphs 1 through 20 of this Complaint.

22. The Sistersville Site is a "facility" within the meaning of CERCLA § 101(9), 42 U.S.C. § 9601(9), and there has been a release of hazardous substances at that facility which has necessitated the incurrence of responses costs consistent with the National Contingency Plan, 40 C.F.R. Part 300.

23. As the owner and operator of the Sistersville Site at the time of disposal of hazardous substances, UCC is strictly liable under Section 107(a)(2) of CERCLA for all response costs incurred and to be incurred by MPM in connection with the Sistersville Site.

COUNT II — RIGHT TO CONTRIBUTION UNDER CERCLA § 113(1)

24. MPM repeats, re-alleges and incorporates by reference as if alleged herein the allegations in paragraphs 1 through 23 of this Complaint.

25. UCC is a person liable under CERCLA § 107(a), 42 U.S.C. § 9607(a), as set forth more fully above.

26. As a person liable under CERCLA § 107(a), 42 U.S.C. § 9607(a), UCC is also liable to MPM for contribution with respect to MPM's response costs pursuant to CERCLA § 113(f), 42 U.S.C. § 9613(f).

COUNT III -- DECLARATORY RELIEF AS TO FUTURE COSTS UNDER CERCLA § 113(g)(2)

27. MPM repeats, re-alleges and incorporates by reference as if alleged herein the allegations in paragraphs 1 through 26 of this Complaint.

28. There is a present and actual controversy between MPM and UCC concerning their respective rights and obligations with respect to CERCLA response costs associated with the Sistersville Site.

29. CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2), provides that courts "shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages."

30. MPM is entitled to a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 and CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2), as to the rights and duties of the parties and, in particular, a determination that UCC is liable under CERCLA §§ 107(a) and 113(f), 42 U.S.C. §§ 9607(a) and 9613(f), for past, present, and future costs of assessment, containment,

response, removal, and remediation arising from the presence of hazardous substances, including 'PCBs, at the Sistersville Site.

COUNT IV — NEGLIGENCE

31. MPM repeats, re-alleges and incorporates by reference as if alleged herein the allegations in paragraphs 1 through 30 of this Complaint.

32. UCC owed a duty to MPM and other future owners of the Sistersville Site to exercise reasonable care in the use, handling, storage, disposal, and release of hazardous substances, including PCBs, on the property.

33. UCC breached its duty to MPM by unreasonably and illegally using, handling, storing, disposing of, and/or releasing hazardous substances, including PCBs, at the Sistersville Site; by failing to report the storage, disposal, and release of such substances as required by law; and by failing to take reasonable precautions necessary to avoid releases of hazardous substances at the Sistersville Site.

34. UCC deliberately concealed the disposal and release of PCBs at the Sistersville Site, as well as the dangers posed to human and health and the environment by that disposal and release, from regulators, from the public, and from subsequent owners, including MPM. With its superior knowledge, UCC had a duty to disclose the existence of, and the dangers posed by, PCBs at the Sistersville Site, which it breached through its deliberate concealment.

35. UCC's actions and inactions relative to its disposal and release of hazardous substances, including PCBs, at the Sistersville Site have been contrary to numerous federal and state laws and regulations, including but not limited to the following:

a.RCRA § 3005, 42 U.S.C. § 6925 (requiring that treatment, storage, and disposal of hazardous wastes be done in accordance with a permit issued after an application describing the hazardous wastes present at the site);

b. RCRA § 3009, 42 U.S.C. § 6928 (among other things, providing for criminal penalties for knowingly treating, storing, or disposing hazardous wastes without a permit and for knowingly omitting material information or making a false material statement in a document filed or used for compliance purposes with RCRA or an authorized state program);

c. W.Va. Code § 22-18-8, formerly W.Va. Code § 20-5E-8 (requiring permits for the storage and disposal of hazardous wastes);

d. W.Va. Code §§ 22-18-16 and 17, formerly W.Va. Code § 20-5E-15 and 16 (providing civil criminal penalties for storage and disposal not in compliance with applicable permits, for making false statements or representations in regards to its hazardous waste management practices, and for failing to provide material information in a permit application);

e. W.Va. Code § 22-18-21, formerly W.Va. Code § 20-5E-20, and the Facility's RCRA Permit (requiring the grantor of any deed for real property to disclose hazardous substances stored, treated, or disposed of at the property); and

f. CERCLA § 103(c), 42U.S.C. § 9603 (requiring disclosure to EPA of the hazardous substances present at facilities and "any known, suspected, or likely releases").

36. UCC's unreasonable and illegal use, handling, storage, disposal, and release of hazardous substances at the Sistersville Site; UCC's failure to abide by applicable laws and/or notify regulators of past disposal and likely ongoing releases of PCBs at the Sistersville Site when UCC knew of those past disposals and considered the risks to human health and the environment from those disposals and/or releases to be of concern; UCC's failure to take reasonable precautions necessary to avoid releases of hazardous substances at the Sistersville

Site; and UCC's intentional failure to disclose the disposal and release of PCBs at the property to regulators, the public, or subsequent owners, constitute negligence, negligence *per se,* willful and wanton negligence, and reckless indifference to the consequences of UCC's actions and inactions.

37. UCC's unreasonable actions and inactions relative to the disposal and release of hazardous substances, including PCBs, at the Sistersville Site caused a release and a threat of 'release of hazardous substances at the Sistersville Site that has resulted in, and continues to cause, damages to MPM including, but not limited to, necessary investigatory and remedial costs, a reduction in the value of MPM's property, costs associated with the interruption of MPM's uses of the property, the potential application of liability under CERCLA to MPM, and costs associated with the impairment of the productive use of MPM's property.

38. As a result of UCC's negligence, UCC is liable to MPM for the foregoing damages, injunctive relief, and punitive damages.

COUNT V — STRICT LIABILITY

39. MPM repeats, re-alleges and incorporates by reference as if alleged herein the allegations in paragraphs 1 through 38 of this Complaint.

40. UCC's use, handling, storage, disposal, and release of hazardous substances, including PCBs, at the Sistersville Site constitutes an abnormally and inherently dangerous activity for which UCC is strictly liable under the common law.

41. Even had UCC met its duty and exercised reasonable care in its use, handling, storage, disposal, and release of hazardous substances, including PCBs, the nature of such activities is such that an unavoidable risk of harm would have remained.

42. The harms that UCC's abnormally dangerous activities at the Sistersville Site have caused are the kind of harms the possibility of which make the use, handling, storage,

disposal, and release of hazardous substances, including PCBs, an abnormally dangerous activity.

43. As a direct and proximate result of the acts and omissions of UCC in using, handling, storing, disposing, and releasing hazardous substances, including PCBs, at the Sistersville Site, MPM has incurred damages and will continue to incur additional damages.

44. UCC is strictly liable to MPM for all damages, costs, and other losses resulting from UCC's use, handling, storage, disposal, and release of hazardous substances, including all necessary costs incurred by MPM in responding to UCC's release of hazardous substances, including PCBs, at the Sistersville Site.

COUNT VI — RESTITUTION

45. MPM repeats, re-alleges and incorporates by reference as if alleged herein the allegations in paragraphs 1 through 44 of this Complaint.

46. As the entity responsible for disposing and releasing hazardous substances at the Sistersville Site, including PCBs, UCC had a duty to act so as to prevent harm to persons or the environment, which duty UCC failed to carry out and presently refuses to carry out.

47. Actions in response to UCC's disposal and release of hazardous substances, including PCBs, at the Sistersville Site are and have been necessary to protect public health, safety, and the environment.

48. As a result of UCC's failure to act, MPM has taken and will be required to take actions at the Sistersville Site to investigate and remediate environmental hazards; MPM has also undertaken steps to monitor, maintain, and operate the SWMUs installed by UCC.

49. MPM undertook these actions unofficiously and with the intent to seek recovery of costs from persons responsible for the environmental hazards.

50. UCC has been, and will be, unjustly enriched by MPM's actions, which have and will reduce UCC's liability arising from its past actions and inactions at the Sistersville Site.

51. It would be against equity and good conscience to permit UCC to pass the burden of responding to UCC's releases of hazardous substances, including PCBs, at the Sistersville Site to MPM.

52. MPM is entitled to restitution from UCC of all costs and expenses incurred or to be incurred by MPM as a result of UCC's disposal and releases of hazardous substances at the Sistersville Site, including all necessary costs incurred by MPM in responding to UCC's releases of hazardous substances and in maintaining and operating SWMUs.

COUNT VII — DECLARATORY JUDGMENT AS TO RESTITUTION

53. MPM repeats, re-alleges and incorporates by reference as if alleged herein the allegations in paragraphs 1 through 52 of this Complaint.

54. There is a present and actual controversy between MPM and UCC concerning their respective rights and obligations with respect to responding to UCC's disposal and release of hazardous substances at the Sistersville Site.

55. UCC is responsible for the disposal and release of hazardous substances at the Sistersville Site, including hazardous wastes deposited in the SWMUs and wastes deposited in Landfill No. 2.

56. MPM will expend costs in responding to UCC's disposal and release of hazardous substances at the Sistersville Site, including but not limited to the costs of maintaining and operating SWMUs and conducting groundwater and other sampling. MPM will also incur substantial costs in the closure of Landfill No. 2. Such costs are necessary to protect public health, safety, and the environment.

57. UCC would be unjustly enriched were MPM to continue to act to address wastes disposed of or released at the Sistersville Site by UCC without restitution from UCC.

58. It would be against equity and good conscience to permit UCC to pass to MPM the burden of these actions to address wastes disposed of or released by UCC.

59, MPM is entitled to a declaratory judgment holding UCC liable for all future actions responding to UCC's disposal and release of hazardous substances at the Sistersville Site, including but not limited to monitoring and maintenance costs associated with the SWMUs and UCC's share of closure costs with respect to Landfill No. 2.

COUNT VIII — INDEMNITY AND/OR CONTRIBUTION

60. MPM repeats, re-alleges and incorporates by reference as if alleged herein the allegations in paragraphs 1 through 59 of this Complaint.

61. UCC, by its acts and omissions described above, caused and will cause MPM to incur substantial liability. That liability of MPM is vicarious and secondary to that of UCC.

62. But for the tortious acts of UCC, MPM would not be subject to such liability.

63. UCC, or persons for whom UCC is liable, are entirely at fault for the damages that have occurred as a proximate result of UCC's releases of hazardous substances, including PCBs, at the Sistersville Site.

64. Because of the disparity in the fault of the parties, MPM is entitled to full indemnification from UCC for the costs of responding to UCC's releases of hazardous substances, including PCBs, at the Sistersville Site as well as any liability incurred as a result of damage claims asserted against MPM by reason of the actions or inactions of UCC.

65. Alternatively, should full indemnification be unavailable to MPM for any reason, MPM is entitled to contribution from UCC for its full and fair share of the costs incurred or to be incurred by MPM in responding to UCC's releases of hazardous substances, including PCBs, at

the Sistersville Site as well as any liability incurred as a result of damage claims asserted against MPM by reason of the actions or inactions of UCC.

COUNT IX — PRIVATE NUISANCE

66. MPM repeats, re-alleges and incorporates by reference as if alleged herein the allegations in paragraphs 1 through 65 of this Complaint.

67. UCC's actions and inactions, including but not limited to UCC's disposal and release of hazardous substances, including PCBs, at the Sistersville Site, UCC's failure to comply with applicable laws and regulations, UCC's failure to take reasonable precautions, and UCC's failure to disclose the presence of hazardous substances at the Sistersville Site have interfered, and will continue to interfere, substantially and unreasonably with MPM's private use of its property.

68. UCC's conduct, as more fully described above, was intentional, unreasonable, negligent, reckless, abnormally dangerous, and/or in violation of law.

69. MPM has been, and continues to be, injured as a direct and proximate result of UCC's actions and inactions.

70. MPM's damages include, but are not limited to, costs of necessary response actions undertaken or to be undertaken by MPM, a reduction in the value of MPM's property, the interruption of MPM's desired use of the property, the potential application of liability under CERCLA to MPM, and the impairment of the productive use of MPM's property.

71. UCC is liable to MPM under the common law of private nuisance for the foregoing damages.

JURY TRIAL DEMAND

72. MPM demands a jury trial, on all matters triable by jury.

PRAYER FOR RELIEF

WHEREFORE, MPM respectfully prays that this court:

A. Enter judgment in favor of MPM and against UCC for all damages, including response costs, incurred by MPM, together with a declaratory judgment pursuant to CERCLA §§ 107(a) and 113(g)(2), 42 U.S.C. §§ 9607(a) and 9613(g)(2), that UCC is liable for all damages, including without limitation response costs and interest, incurred or to be incurred by MPM in connection with the Sistersville Site, together with the costs of this action, expenses, and attorneys' fees according to law.

B. Enter judgment in favor of MPM and against UCC, pursuant to CERCLA § 113(f), holding UCC liable for its equitable share of response costs incurred or to be incurred by MPM in connection with the Sistersville Site and interest thereon, together with declaratory relief for an allocation of all future response costs and other compensable damages in accordance with CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2), together with the costs of this action, expenses, and attorneys' fees according to law.

C. Enter judgment in favor of MPM and against UCC holding UCC liable under the common law doctrine of negligence for all damages resulting from UCC's negligent, willful, wanton, and reckless actions and inactions, including without limitation all necessary costs incurred or to be incurred by MPM in responding to UCC's disposal and release of hazardous substances at the Sistersville Site, together with interest thereon and such punitive damages as the court deems just and proper.

D. Enter judgment in favor of MPM and against UCC holding UCC liable under the common law doctrine of strict liability for all damages, including without limitation all costs incurred or to be incurred by MPM in responding to UCC's release of hazardous substances at the Sistersville Site, resulting from UCC's use, handling, storage, disposal, or release of hazardous substances, including PCBs, at the Sistersville Site, together with interest thereon and such punitive damages as the court deems just and proper.

E. Enter judgment in favor of MPM and against UCC for restitution of MPM's costs incurred in responding to UCC's disposal and release of hazardous substances at the Sistersville Site, including interest, together with a declaratory judgment that UCC is liable for all costs incurred or to be incurred in responding to UCC's disposal and release of hazardous substances at the Sistersville Site, including interest.

F. Enter judgment in favor of MPM and against UCC under the common law doctrine of indemnity for MPM's costs incurred in responding to UCC's disposal and release of hazardous substances at the Sistersville Site, together with a declaratory judgment that UCC is liable for costs and damages incurred or to be incurred by MPM in connection with UCC's disposal and release of hazardous substances at the Sistersville Facility, together with the costs of this action, such punitive damages as the court deems to be just and proper, attorney's fees according to law, and interest.

G. Enter judgment in favor of MPM and against UCC holding UCC liable to MPM for past and future costs and damages incurred by MPM as a result of the private nuisance caused by UCC, including all costs incurred in abating that nuisance, together with interest thereon and such punitive damages as the court deems to be just and proper.

H. Grant MPM injunctive relief in the form of an order requiring UCC to participate in the cleanup of environmental contamination at and emanating from the Sistersville Site.

1. Grant MPM such other and further relief as the court deems to be just and proper.

DATED: December 30, 2011
Albany, New York

Respectfully submitted,

WHITEMAN OSTERMAN & HANNA LLP

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